

10
No. 97-1252

FILED

SEP 11 1998

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, ATTORNEY GENERAL, *et al.*,
v. *Petitioners,*

AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE AMERICAN IMMIGRATION LAW
FOUNDATION, THE AMERICAN IMMIGRATION
LAWYERS ASSOCIATION, THE FLORIDA IMMIGRANT
ADVOCACY CENTER, THE IMMIGRATION AND
REFUGEE SERVICES OF AMERICA, THE LAWYERS
COMMITTEE FOR CIVIL RIGHTS OF THE
SAN FRANCISCO BAY AREA, THE LAWYERS
COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF
TEXAS, THE MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND, THE MIDWEST
IMMIGRANT RIGHTS CENTER, THE NATIONAL
COALITION TO PROTECT POLITICAL FREEDOM,
AND THE NATIONAL COUNCIL OF LA RAZA
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

NADINE K. WETTSTEIN
AMERICAN IMMIGRATION LAW
FOUNDATION
1400 Eye Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 216-2400

IRA J. KURZBAN
Counsel of Record
PETER HOFER
KURZBAN, KURZBAN,
WEINGER & TETZELI
2650 SW 27th Avenue
Miami, FL 33133
(305) 444-0060

Attorneys for Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

36 PP

QUESTION PRESENTED

Whether, in light of the Illegal Immigration Reform and Immigrant Responsibility Act, the courts below had jurisdiction to entertain Respondents' challenge to the deportation proceedings prior to the entry of a final order of deportation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE AMICI CURIAE	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	4
ARGUMENT	8
I. ANY CONFLICT BETWEEN PROVISIONS OF IIRIRA MUST BE RESOLVED TO PRO- VIDE JUDICIAL REVIEW FOR ALIENS WHO WERE IN DEPORTATION PROCEED- INGS PRIOR TO IIRIRA'S EFFECTIVE DATE	8
II. COURTS TRADITIONALLY HAVE RECOG- NIZED EXCEPTIONS TO SECTION 1105a THAT ALLOW DISTRICT COURT REVIEW OF DEPORTATION PROCEEDINGS	16
III. BY ITS VERY TERMS, SECTION 2347(b) APPLIES ONLY WHERE NO AGENCY HEARING HAS BEEN HELD	24
IV. ALTHOUGH RESPONDENTS COULD NOT CHALLENGE THIS SELECTIVE ENFORCE- MENT OF DEPORTATION PROCEEDINGS, MANY CONSTITUTIONAL CLAIMS MAY BE PRESENTED TO THE IMMIGRATION JUDGE AND THE BOARD OF IMMIGRA- TION APPEALS	28
CONCLUSION	29

TABLE OF AUTHORITIES

CASES	Page
<i>Abbott Laboratories v. Gardner</i> , 387 U.S. 136 (1967)	9
<i>Abedi-Tajrishi v. INS</i> , 752 F.2d 441 (9th Cir. 1985)	19
<i>Akrap v. INS</i> , 966 F.2d 267 (7th Cir. 1992)	19
<i>Ali v. INS</i> , 661 F. Supp. 1234 (D. Mass. 1986)	19, 22
<i>Alleyne v. INS</i> , 879 F.2d 1177 (3d Cir. 1989)	28
<i>American-Arab Anti-Discrimination Committee v. Reno</i> , 119 F.3d 1367 (9th Cir. 1997)	27
<i>American-Arab Anti-Discrimination Committee v. Reno</i> , 70 F.3d 145 (9th Cir. 1995)	27
<i>Baria v. Reno</i> , 94 F.3d 1335 (9th Cir. 1996)	18
<i>Barlow v. Collins</i> , 397 U.S. 159 (1970)	9
<i>Belcher v. Stengel</i> , 429 U.S. 118 (1976)	17
<i>Bowen v. Michigan Academy of Family Physicians</i> , 476 U.S. 667 (1986)	9
<i>Butros v. INS</i> , 804 F. Supp. 1336 (D. Ore. 1991) ..	19
<i>Campos v. Nail</i> , 940 F.2d 495 (9th Cir. 1991)	22
<i>Cheng Fan Kwok v. INS</i> , 392 U.S. 206 (1968)	6, 13, 18, 19, 29
<i>Commissioner of Internal Revenue v. Asphalt Products Co.</i> , 482 U.S. 117 (1987)	15
<i>Coriolan v. INS</i> , 559 F.2d 993 (5th Cir. 1977)	27
<i>Demarest v. Manspeaker</i> , 498 U.S. 184 (1991)	7, 14, 25
<i>Dunlap v. Bachowski</i> , 421 U.S. 560 (1975)	9
<i>El Rescate Legal Serv. v. Executive Office for Immigration Review</i> , 959 F.2d 742 (9th Cir. 1991)	22
<i>Estep v. United States</i> , 327 U.S. 114 (1946)	10
<i>Exportal Ltda v. U.S.A.</i> , 902 F.2d 45 (D.C. Cir. 1990)	26
<i>Florida Power and Light Co. v. Lorion</i> , 470 U.S. 729 (1985)	8, 25
<i>Foti v. INS</i> , 375 U.S. 217 (1978)	21
<i>Gando-Coello v. INS</i> , 857 F.2d 25 (1988)	19
<i>Ghaelian v. INS</i> , 717 F.2d 950 (6th Cir. 1983)	19
<i>Ghorbani v. INS</i> , 686 F.2d 784 (9th Cir. 1982)	27, 29
<i>Gonzalez-Julio v. INS</i> , 34 F.3d 820 (1994)	28
<i>Gonzalez-Rivera v. INS</i> , 22 F.3d 1441 (9th Cir. 1994)	28

TABLE OF AUTHORITIES—Continued

	Page
<i>Gottesman v. INS</i> , 33 F.3d 383 (4th Cir. 1994)	18
<i>Haitian Refugee Center v. Smith</i> , 676 F.2d 1023 (5th Cir. 1982)	8, 21, 27, 29
<i>Hampton v. Mow Sun Wong</i> , 426 U.S. 88 (1976)	15
<i>Harmon v. Brucker</i> , 355 U.S. 579 (1958)	10
<i>INS v. Chadha</i> , 462 U.S. 919 (1983)	18, 19
<i>INS v. Lopez-Mendoza</i> , 468 U.S. 1032 (1984)	28
<i>Jaa v. INS</i> , 779 F.2d 569 (9th Cir. 1986)	19
<i>Jean v. Nelson</i> , 727 F.2d 957 (11th Cir. 1984) (<i>en banc</i>), <i>aff'd as to judgment to remand only</i> , 472 U.S. 846 (1985)	8, 13, 21, 27, 29
<i>Johnson v. Robison</i> , 415 U.S. 361 (1974)	9, 10
<i>Kimbrough v. United States</i> , 364 U.S. 661 (1961) ..	17
<i>Lake Carriers' Ass'n v. U.S.A. (FCC)</i> , 414 F.2d 567 (6th Cir. 1969)	26
<i>Lincoln v. Vigil</i> , 508 U.S. 182 (1993)	9
<i>Lloyd v. Sabauda Societa v. Elting</i> , 287 U.S. 329 (1932)	10
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803)	16
<i>Massieu v. Reno</i> , 91 F.3d 416 (3d Cir. 1996)	22
<i>Massieu v. Reno</i> , 915 F. Supp. 681 (D.N.J. 1996) <i>rev'd on other grounds</i> , 91 F.3d 416 (3d Cir. 1996)	23
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	10
<i>McNary v. Haitian Refugee Center</i> , 498 U.S. 479 (1991)	<i>passim</i>
<i>Mohammadi-Motlagh v. INS</i> , 727 F.2d 1450 (9th Cir. 1984)	19
<i>The Monrosa v. Carbon Black Export, Inc.</i> , 359 U.S. 180 (1959)	17
<i>Oestereich v. Selective Service Systems Local Board No. 11</i> , 393 U.S. 233 (1968)	9, 10
<i>Olaniyan v. District Director, INS</i> , 796 F.2d 373 (10th Cir. 1986)	18
<i>Orantes-Hernandez v. Meese</i> , 685 F.Supp. 1488, <i>aff'd sub nom., Orantes-Hernandez v. Thornburgh</i> , 919 F.2d 549 (9th Cir. 1990)	22
<i>Orhorhaghe v. INS</i> , 38 F.3d 488 (9th Cir. 1994)	28

TABLE OF AUTHORITIES—Continued

	Page
<i>Peabody Coal Co. v. Navajo Nation</i> , 75 F.3d 457 (9th Cir. 1996)	15
<i>Radio Relay Corp. v. FCC</i> , 409 F.2d 322 (2d Cir. 1969)	26
<i>Ratzlaf v. United States</i> , 510 U.S. 135 (1994)	14
<i>Reid v. INS</i> , 766 F.2d 113 (3d Cir. 1985)	19
<i>Reynolds v. INS</i> , 846 F.2d 1288 (11th Cir. 1988) ..	19
<i>Shaughnessy v. Pedreiro</i> , 349 U.S. 48 (1955)	10
<i>Tefel v. Reno</i> , 972 F.Supp. 608 (S.D.Fla. 1997)	14, 15, 20, 21
<i>Toolee v. INS</i> , 722 F.2d 1434 (9th Cir. 1983)	19
<i>Traynor v. Turnage</i> , 485 U.S. 535 (1988)	9, 10
<i>United States ex rel. Accardi v. Shaughnessy</i> , 347 U.S. 260 (1954)	14
<i>United States v. Kirkland</i> , 12 F.3d 199 (11th Cir. 1994)	14
<i>United States v. Verdugo-Urquidez</i> , 494 U.S. 259 (1990)	16
<i>Vlassis v. INS</i> , 963 F.2d 547 (2d Cir. 1992)	19
<i>Webster v. Doe</i> , 468 U.S. 592 (1988)	9
<i>Weinberger v. Salfi</i> , 422 U.S. 749 (1975)	10
<i>Yi v. Maugens</i> , 24 F.3d 500 (3d Cir. 1994)	23
<i>Young v. United States Dep't of Justice, INS</i> , 759 F.2d 450 (5th Cir. 1985)	19
<i>Zhen Tau Liu v. INS</i> , 55 F.3d 421 (9th Cir. 1995)	8, 28, 29

ADMINISTRATIVE DECISIONS

<i>Matter of N-J-B</i> , Interim Decision No. 3309 (BIA Feb. 20, 1997)	16
<i>Matter of Soriano</i> , Interim Decision No. 3289 (AG Feb. 21, 1996)	16

STATUTES

8 U.S.C. § 1101 (a) (5)	14, 27
8 U.S.C. § 1105a	<i>passim</i>
8 U.S.C. § 1105a (a) (4)	27
8 U.S.C. § 1252 (b)	13
8 U.S.C. § 1252 (f)	12, 13
8 U.S.C. § 1252 (g)	<i>passim</i>

TABLE OF AUTHORITIES—Continued

	Page
Hobbs Act	
28 U.S.C. § 2347 (b)	7, 24, 25, 27
28 U.S.C. § 2347 (b) (2)	26
28 U.S.C. § 2347 (b) (3)	<i>passim</i>
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009	
§ 306 (c) (1)	5, 11, 12, 13
§ 309 (c)	10, 12, 13
§ 309 (c) (1)	9, 10
§ 309 (c) (2)	5, 11
§ 309 (c) (3)	5
§ 309 (c) (4)	10

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

No. 97-1252

JANET RENO, ATTORNEY GENERAL, *et al.*,
v. *Petitioners,*

AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE AMERICAN IMMIGRATION LAW
FOUNDATION, THE AMERICAN IMMIGRATION
LAWYERS ASSOCIATION, THE FLORIDA IMMIGRANT
ADVOCACY CENTER, THE IMMIGRATION AND
REFUGEE SERVICES OF AMERICA, THE LAWYERS
COMMITTEE FOR CIVIL RIGHTS OF THE
SAN FRANCISCO BAY AREA, THE LAWYERS
COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF
TEXAS, THE MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND, THE MIDWEST
IMMIGRANT RIGHTS CENTER, THE NATIONAL
COALITION TO PROTECT POLITICAL FREEDOM,
AND THE NATIONAL COUNCIL OF LA RAZA
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS¹

¹ This brief is filed with the consent of both Petitioner and Respondents, and letters reflecting those consents have been filed with

INTEREST OF THE AMICI CURIAE

The American Immigration Law Foundation (AILF) is a non-profit public education and advocacy organization whose mission is to increase public understanding of immigration law and policy and the value of immigration to American society. AILF's goals include promoting public service and professional excellence in immigration practice, and advancing fundamental fairness and due process in United States immigration law and its administration. AILF has a direct and serious interest in the development of immigration law, as well as in civil and criminal cases affecting the rights of non-citizens.

The American Immigration Lawyers Association (AILA) is a national non-profit association of immigration and nationality lawyers. AILA is an affiliated organization of the American Bar Association, with more than 5,000 members. AILA's objectives are to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence therein; to promote reforms in the laws with regard thereto; and to facilitate the administration of justice therein.

The Florida Immigrant Advocacy Center (FIAC) is a Florida non-profit legal service organization dedicated to ensuring fair treatment of non-immigrants, immigrants, and refugees through direct legal services and advocacy efforts. FIAC's ability to adequately represent its clients would be drastically undermined by denial of federal court jurisdiction in immigration cases. In case after case in Florida, recourse to federal court has been indispensable in protecting the rights of immigrants.

the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than *amici* or their counsel, contributed monetarily to the preparation of this brief.

Immigration and Refugee Services of America (IRSA) is a non-profit humanitarian organization that for more than 80 years has addressed the needs and rights of persons in forced or voluntary migration worldwide. IRSA has pursued its mission by advancing fair and humane public policy, facilitating and providing direct professional services, and promoting the full participation of migrants in community life. IRSA has a profound interest in the development of fair and just laws pertaining to the rights of immigrants.

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area (Lawyers Committee) is a civil rights and legal services organization devoted to advancing the rights of people of color, low-income individuals, immigrants and refugees, women, children and other under-represented persons. The Lawyers' Committee is affiliated with the Lawyers' Committee for Civil Rights Under Law in Washington, D.C., which was created at the behest of President Kennedy in 1963. In 1968, the Lawyers' Committee was established by leading members of the private bar in San Francisco.

The Lawyers' Committee for Civil Rights Under Law of Texas, Immigrant and Refugee Rights Project, also is part of the national network of nonpartisan, nonprofit Lawyers' Committees founded in 1963 to provide legal services to victims of discrimination. The Texas Lawyers' Committee, founded in 1991, is committed to attaining and preserving civil rights for immigrants and refugees.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1967. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. The defense of the constitutional rights of immigrants is in the best interests of the Latino community, and MALDEF has taken strong positions in support of immigrants' right through all of its activities.

The Midwest Immigrant Rights Center, a program of Heartland Alliance for Human Needs and Human Rights, has provided legal service to and advocacy on behalf of Chicago area residents since 1888. For over 100 years, the Heartland Alliance has met the needs of Chicago's immigrants and refugees through a broad range of social, educational, legal, health, housing, and employment programs.

The National Coalition to Protect Political Freedom is composed of approximately 30 national and international organizations, including those concerned with civil liberties, law, and human and ethnic rights. The Coalition is a project of the Interreligious Foundation for Community Organizations. The Coalition's goals include supporting the First Amendment rights of both citizens and non-citizens to freedom of speech and political association.

The National Council of La Raza (NCLR) is a private, nonprofit, nonpartisan organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans. NCLR is the largest constituency-based national Hispanic organization, serving all Hispanic nationality groups in all regions of the country with more than 200 formal affiliates. NCLR conducts immigration policy analysis and advocacy in its role as a civil rights organization.

STATEMENT OF THE CASE

In the interest of brevity, *amici* hereby incorporate by reference the Statement contained in Respondents' brief.

SUMMARY OF ARGUMENT

1. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") must be interpreted so as to provide judicial review for the claims of aliens who, like Respondents, were in deportation proceedings prior to April 1, 1997, IIRIRA's effective date.

Petitioners admit that their reading of IIRIRA, whereby section 1252(g) is applied independently of the remainder of section 1252, would result in the complete denial of all judicial review for such aliens. Such a result, however, would be contrary to the well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action, and more specifically, review of colorable constitutional claims, and would raise serious constitutional questions.

2. One resolution to the statutory anomaly is to read section 1252(g) as applying to claims arising from deportation proceedings pending on April 1, 1997, only where the Attorney General has invoked the new section 1252 judicial review procedures in their entirety (as she is authorized to elect under section 309(c)(2) and (3)). In other words, section 1252(g) would apply "without limitation" only when the Attorney General has elected to proceed under section 1252. This would give meaning to the opening words of 1252(g), which states that "except as provided in this section . . . no court shall have jurisdiction" to hear claims concerning removal proceedings. If, however, 1252(g) applies independently of the remainder of section 1252, as Petitioners assert, its opening clause is rendered meaningless, and the "exclusive jurisdiction" of section 1252(g) becomes "no jurisdiction" for aliens in deportation proceedings before April 1, 1997. Again, this result is contrary to well-settled law and leads to an unconstitutional result.

3. Another resolution is for aliens in deportation proceedings before April 1, 1997 to obtain judicial review of their claims pursuant to the former Section 106 of the Immigration and Nationality Act ("INA") (codified at 8 U.S.C. section 1105a (1994)). Petitioners themselves concede that this is the proper resolution to the "textual anomaly" presented by section 306(c)(1) and section 309(c). While Petitioners claim that section 1105a limits jurisdiction to appellate review of final orders of deportation, exceptions to this general proposition long have been

recognized so as to avoid the delay and procedural redundancy that Congress sought to eliminate by enacting section 1105a.

4. The plain statutory language of section 1252(g) provides another resolution to the conflict at issue, for section 1252(g) only precludes judicial review of "the decision or action of the Attorney General," and the term Attorney General is specifically defined in the INA as the "Attorney General of the United States." Section 1252(g), therefore, only restricts judicial review of the specific decisions of the Attorney General, and not lower level governmental officials. This reading is consistent with the principle that while persons at the highest level of government are accorded deference, such deference may not be accorded to lower level officials. If section 1252(g) is read otherwise, then any immigration decision made by any person who works, in any capacity, for the Justice Department would be immune from review. Such a sweeping interpretation should not be presumed from a statute that on its face plainly expresses a contrary intent.

5. Moreover, Petitioners' concession that proper resolution of this case is pursuant to section 1105a, and not the IIRIRA, suggests that certiorari was improvidently granted in this instance. The only question before the Court is whether, in light of the IIRIRA, the courts below had jurisdiction to entertain Respondents' challenge to the deportation proceedings. Since Petitioners now concede that section 1105a properly provides jurisdiction, the grant of certiorari appears improvident.

6. Initial district court review of Respondents' constitutional and statutory claims is proper pursuant to section 1105a. This Court, in *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968), first recognized an exception to section 1105a allowing district court review of matters collateral to final orders of deportation. Numerous courts have since followed the instructions and logic of *Cheng Fan*

Kwok, allowing initial district court review of constitutional and other claims preliminary to, or not a part of, final orders of deportation. Such review eliminates needless administrative hearings and appeals, and instead provides prompt review of dispositive issues prior to the filing of a final order of deportation.

7. Initial district court review is necessary, for example, to provide meaningful review of class action challenges to deportation proceedings that contain allegations of constitutional and statutory violations. Restricting review to appellate courts, which lack fact-finding and record developing capabilities, would deny thousands of aliens meaningful review of their statutory and constitutional claims. *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991). It also would cause tens of thousands of aliens to present in the administrative process individual claims that could not even be heard in that process, then file individual appeals to the circuit courts, only to have those cases remanded, case-by-case, to the district court for additional fact finding. This procedure, advocated by Petitioners, fosters the very delay and procedural redundancy section 1105a was enacted to eliminate. The reasonable exceptions to section 1105a that allow initial district court review where appellate review is inadequate should not be abandoned now.

8. To bolster its argument and save it from an obvious constitutional deficiency, Petitioners assert that 28 U.S.C. section 2347(b)(3) may permit fact finding of constitutional claims after the entry of a final order of deportation. To reach this result, Petitioners ignore the plain language of section 2347(b), which makes the section applicable only when the agency has not held a hearing and is not required to do so. One also must look in vain in the language of section 2347(b) for Petitioners' assertion that it applies to review "ancillary factual issues." Petitioners' reading therefore violates the plain language of the statute and cannot be adopted. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991). Not surprisingly,

no court has ever accepted Petitioners' interpretation of section 2347(b)(3). Court decisions demonstrate that it is properly invoked only when the agency has not conducted a hearing. *Florida Power and Light Co. v. Lorion*, 470 U.S. 729, 740 (1985).

9. The ability to bring district court actions does not mean that all constitutional claims must be adjudicated in the district courts. Many "administratively correctable procedural errors" may be addressed by the Board of Immigration appeals administratively "even when the errors are failures to follow due process." *Zhen Tau Liu v. Waters*, 55 F.3d 421, 426 (9th Cir. 1995). So while some constitutional questions may be heard administratively, broad-based challenges to INS' patterns and practices, for example, are properly brought in the district court. See, e.g., *McNary, supra*, *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (*en banc*), *aff'd as to judgment to remand only*, 472 U.S. 846 (1985); *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982). Further, facial constitutional challenges not requiring factual development can be decided initially in the courts of appeals. *Zhen Tau Liu v. Waters*, 55 F.3d 421 (9th Cir. 1995).

ARGUMENT

I. ANY CONFLICT BETWEEN PROVISIONS OF IIRIRA MUST BE RESOLVED TO PROVIDE JUDICIAL REVIEW FOR ALIENS WHO WERE IN DEPORTATION PROCEEDINGS PRIOR TO IIRIRA'S EFFECTIVE DATE

1. Petitioners argue that only one provision of IIRIRA's new judicial review scheme, section 1252(g), applies to aliens in deportation proceedings prior to April 1, 1997. The rest of section 1252, Petitioners acknowledge, does not apply because Congress specified that pending cases were to be governed by pre-IIRIRA judicial review procedures. Petitioners also concede that the result of the application of the new section 1252(g)

to the claims of the thousands of aliens, like Respondents, who were placed in deportation proceedings prior to April 1, 1997 (IIRIRA's effective date) would be the complete denial of *all* judicial review. Such a result, however, is in conflict with section 309(c)(1), which provides that the new amendments shall not apply for aliens who were in deportation proceedings before April 1, 1997, and that the proceedings, including judicial review, shall continue to be conducted without regard to such amendments. The Court must interpret any conflicting provisions of IIRIRA to provide judicial review for the constitutional and statutory claims of these aliens.

An interpretation of the statutory provisions that results in a denial of all judicial review would raise serious constitutional questions, as well as conflict with this Court's "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action." *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986); see also *Traynor v. Turnage*, 485 U.S. 535, 542 (1988); *Dunlap v. Bachowski*, 421 U.S. 560, 567 (1975). Judicial review "is the rule, and nonreviewability an exception which must be demonstrated." *Barlow v. Collins*, 397 U.S. 159, 166-67 (1970). The strong presumption favoring judicial review may be overcome "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) (citations omitted); accord *Lincoln v. Vigil*, 508 U.S. 182, 195 (1993).

The Court requires this heightened showing that judicial review has been precluded so as to avoid "the 'serious constitutional question' that would arise if a federal statute were to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 468 U.S. 592, 603 (1988); See *Bowen*, 476 U.S. at 681 n.12; *Johnson v. Robison*, 415 U.S. 361, 367-74 (1974); *Oestereich v. Selective Service Systems Local Board No. 11*, 393 U.S.

233, 237-38 (1968). Thus, even where statutes on their face bar judicial review of agency action, this Court has interpreted them to permit review of *constitutional* claims. See, e.g., *Johnson*, 415 U.S. at 367-73 (statute purporting to preclude review over all claims did not affect jurisdiction over constitutional claims); *Weinberger v. Salfi*, 422 U.S. 749 (1975); *Oestereich*, 393 U.S. at 237-38; *id.* at 240-43 (Harlan, J., concurring); *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 52 (1955); *Estep v. United States*, 327 U.S. 114, 120-23 (1946); *id.* at 128 (Murphy, J., concurring); *Lloyd v. Sabauo Societa v. Elting*, 287 U.S. 329, 334-37 (1932). Moreover, the Court has previously upheld district court review where a finding of preclusion could foreclose all *meaningful* review. See, e.g., *McNary v. Haitian Refugee Center*, 498 U.S. at 496; *Traynor v. Turnage*, 485 U.S. at 542; *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976). In accordance with this Court's jurisprudence favoring judicial review, the statutory provisions in this case must be interpreted so as to provide meaningful judicial review of constitutional claims such as those put forward by Respondents. Any other holding would deprive thousands of aliens of the opportunity to have their colorable claims of constitutional violations by the INS judicially reviewed.

2. Section 309(c) provides that, subject to the "succeeding provisions" (which establish "transitional changes in judicial review" but do not include section 1252(g)), the judicial review "amendments made by this subtitle shall not apply, and the proceedings (including judicial review thereof) shall be conducted without regard to such amendments" for aliens in deportation proceedings prior to April 1, 1997. Section 309(c)(1)(A) and (B). Since section 1252(g) is not included in section 309(c)(4), it does not apply to pending cases.

Section 1252(g), entitled "Exclusive Jurisdiction," states that [e]xcept as provided in this section and not-

withstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act." If, as Petitioners argue, section 1252(g) does apply to aliens with claims pending on April 1, 1997, *independently* from the remainder of section 1252, the opening words, "except as provided in this section" have no meaning and are superfluous.² Moreover, such a reading transforms what was titled "exclusive jurisdiction" into "absolutely no jurisdiction" for the thousands of aliens, like Respondents, who were in deportation proceedings on April 1, 1997. Again, such a result cannot pass constitutional scrutiny.

Section 306(c) provides that section 1252(g) "shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings." Section 306(c), then, makes section 1252(g) retroactive in scope, and provides that when section 1252 is applied by the Attorney General in its entirety (hence the "except as provided in this section" language in (g)), section 1252(g) will apply without limitation. This reading would apply only when the Attorney General elects to invoke the new judicial review procedures for pending cases, as she is authorized to do pursuant to section 309(c)(2) and (3). In other words, if the Attorney General elects to invoke the judicial review procedures

² Petitioners also argue that section 1252(g)'s language "except as provided in this section" refers not to section 1252 (as the plain language states), but rather to 8 U.S.C. section 1105a. Pet. Br. at 30-31 n.15. Not only is section 1105a not in section 1252 ("this section") but also it was repealed by the IIRIRA. Petitioners argument that section 1105a is somehow the referenced section in section 1252(g) also ignores (g)'s plain language of "notwithstanding any other provision of law." For the plain language of section 1252(g) to have meaning, it must be read in reference to the rest of section 1252.

of section 1252, section 1252(g) applies without limitation; otherwise, section 1252(g) is inapplicable to aliens in deportation proceedings prior to April 1, 1997 (as provided by section 309(c)).

If, however, section 1252(g) is read to apply independently from the rest of section 1252, as Petitioners suggest, the first words of section 1252(g) would be meaningless. The rest of section 1252(g) would raise a serious constitutional question because it then would preclude any and all judicial review for thousands of aliens, and it would fail to reconcile section 306(c) with section 309(c), which expressly provides that none of the judicial review amendments in section 1252 applies to pending cases.

Further, if section 1252(g) is read in conjunction with the rest of section 1252 (as its plain language instructs), the judicial review afforded would be similar to that provided under the former section 1105a. Under this section 1252 scheme, exclusive review of claims that could be adequately addressed on appellate review would be with the court of appeals, while for those claims (such as Respondents') where an appellate court could not provide meaningful review, aliens in deportation proceedings could seek injunctive relief in the district court pursuant 8 U.S.C. section 1252(f).

3. Petitioners, finding themselves caught in this statutory netherworld between section 306(c)(1) and section 309(c), initially argue that "while the rest of new Section 1252 is inapplicable to aliens who (like Respondents) were placed in deportation proceedings before IIRIRA's effective date, Section 1252(g) is immediately available to such aliens" Pet. Br. at 29-30. Petitioners then admit that such an interpretation would deprive Respondents, and thousands of others similarly situated, "of *all* judicial review, even after the entry of a final order." Pet. Br. at n.15. Aware that such a result could not pass constitutional scrutiny, Petitioners finally concede that

"the textual anomaly [between section 306(c)(1) and section 309(c)] is properly resolved by holding that respondents may obtain judicial review . . . pursuant to the provisions of former 8 U.S.C. section 1105a (1994) rather than pursuant to the new Section 1252."³ Pet. Br. at n.15.

Upon conceding the applicability of section 1105a, Petitioners next attempt to strictly limit review under section 1105a to appellate review of final orders of deportation, precluding any district court review of colorable statutory or constitutional claims. In so doing, Petitioners simply ignore the fact that this limitation has long since been rejected. *See, e.g., Cheng Fan Kwok; McNary; Jean v. Nelson*. District court review of matters collateral to final orders of deportation, such as class action challenges to proceedings that require fact finding beyond the scope of administrative review, traditionally has been recognized as an exception to section 1105a's limitation of appellate review of final orders of deportation.

4. Another resolution to this statutory conflict is found in the plain language of section 1252(g), which provides that ". . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action *by the Attorney General* to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." 8 U.S.C. section 1252(g) (emphasis added). The Immigration and Nationality Act specifically provides that "[t]he term 'Attorney General' means the Attorney General of the

³ Petitioners' concession that the proper resolution of claims that involve deportation proceedings prior to April 1, 1997 is pursuant to section 1105a renders most of their brief irrelevant. In the end, Petitioners' lengthy discussions of sections 1252(b)(9), 1252(f), and even 1252(g) have no bearing on the outcome of this case.

United States." INA § 101(a)(5), 8 U.S.C. section 1101 (a)(5). No other person or official is mentioned.

In other words, section 1252(g) only precludes judicial review of "the decision or action of the Attorney General" herself, and in Respondents' case, the challenged decision or action was made by lower governmental officials, not by the Attorney General. In this way, section 1252(g) does not apply to this case (or bar judicial review), because the statute does not prohibit judicial review of the decisions or actions of lower level of government officials.

This reading of the plain language of section 1252(g) was approved in *Tefel v. Reno*, 972 F. Supp. 608, 612-16 (S.D. Fla. 1997), which held that the statute did not, on its face, bar the exercise of a district court's federal question jurisdiction. As the court reasoned, a decision by a lower level government official "is not factually, nor legally, the decision of the Attorney General. The Supreme Court recognized in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) that there was a clear separation between the Attorney General and the BIA and that the Attorney General could not, without violating due process, interfere with the deliberative process of the BIA." *Id.* at 613 n.1. In *Tefel*, as in this case, the government failed to present any evidence that the Attorney General herself ordered or directed the specific actions challenged. *Id.*

Such a reading of section 1252(g) also is consistent with the principles governing statutory construction of preclusion statutes. If the statutory language is clear on its face, the inquiry ends and no review of the legislative history or administrative practice is necessary or appropriate. *Ratzlaf v. United States*, 510 U.S. 135, 146 and n.18 (1994); *United States v. Kirkland*, 12 F.3d 199 (11th Cir. 1994); *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991).

Nor would this reading of section 1252(g) lead to an unreasonable result, although even if it did, the plain language still would control. *Tefel*, 972 F. Supp. at 613, citing *Commissioner of Internal Revenue v. Asphalt Products Co.*, 482 U.S. 117, 121 (1987); *Peabody Coal Co. v. Navajo Nation*, 75 F.3d 457, 468 (9th Cir. 1996). Restricting judicial review solely to the specific decisions of the Attorney General and not to those of lower level government officials also is consistent with the principle that while persons at the highest level of government may be accorded deference, such deference may not be accorded lower level officials. *Tefel*, 972 F. Supp. at 613, citing *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976). If the Court were instead to adopt Petitioners' broad reading of section 1252(g), then "any immigration decision of any person who works, in any way, for the Department of Justice would be insulated from review." *Tefel*, 972 F. Supp. at 613. It would be improper to presume such a sweeping interpretation of a statute that on its face expresses an unambiguous contrary intent.

While Petitioners may argue that the term "Attorney General" has been presumed to include the Attorney General's delegates as well, since many immigration statutes specifically name the Attorney General, this argument lacks merit. First, the former INA § 106(a) (codified as 8 U.S.C. section 1105a) expressly did not name the Attorney General.⁴ Second, the mere fact that there has

⁴ Former section 1105(a) reads: "[t]he procedure prescribed by, and all the provisions of chapter 158 of Title 28 shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provision of any prior Act" Compare this language with the new section 1252(g): ". . . no court shall have jurisdiction to hear any cause or claim by or behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." 8 U.S.C. section 1252(g) (emphasis added).

not been a previous challenge as to this reading of section 1252(g) does not mean that section 1252(g) applies to decisions other than those made by the Attorney General herself. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) ("The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions . . . and such assumptions—even on jurisdictional issues—are not binding in future cases").

Additionally, while the Attorney General may delegate her authority under the INA to lower level government officials in limited circumstances (*see* INA sections 103(a)(4), (a)(6) and (c)), she cannot determine the extent of federal jurisdiction by delegating her authority, because to do so would be contrary to the fundamental principle that "it is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

The fact that the Attorney General herself has in the past taken actions or made decisions concerning the removal of aliens supports the interpretation that section 1252(g)'s restriction is limited, as its plain language states, to the decisions or actions of the Attorney General herself. *See, e.g., Matter of N-J-B*, Interim Decision No. 3309 (BIA, Feb. 20, 1997); *Matter of Soriano*, Interim Decision No. 3289 (AG, Feb. 21, 1996).

II. COURTS TRADITIONALLY HAVE RECOGNIZED EXCEPTIONS TO SECTION 1105a THAT ALLOW DISTRICT COURT REVIEW OF DEPORTATION PROCEEDINGS

1. The district court's jurisdiction was proper pursuant to the former 8 U.S.C. section 1105a. As Petitioners themselves ultimately conceded, this case is not properly resolved under the IIRIRA, as judicial review for aliens in deportation proceedings prior to April 1, 1997, is obtained pursuant to section 1105a ("judicial review is avail-

able for such aliens only as provided in 8 U.S.C. section 1105a itself"). Pet. Br. at n.15. Petitioners' concession strongly suggests that certiorari was improvidently granted in this case, for the only question presented on certiorari is "whether, in light of the IIRIRA, the courts below had jurisdiction to entertain Respondents' challenge to the deportation proceedings prior to the entry of a final order of deportation." Since Petitioners themselves now argue that proper resolution of this case would be for Respondents to obtain judicial review pursuant to section 1105a, not the IIRIRA, the grant of certiorari was improvident. *Belcher v. Stengel*, 429 U.S. 118, 119 (1976); *Kimbrough v. United States*, 364 U.S. 661 (1961); *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959).

2. Prior to the enactment of IIRIRA, judicial review of deportation proceedings was governed by section 106(a) of the INA, 8 U.S.C. section 1105a (1994).⁵ Although former section 1105a generally limited appellate review to final orders of deportation, exceptions to this general rule traditionally have been recognized to allow district court review of challenges to deportation proceedings that require fact finding beyond the scope of administrative review, or that involve issues that if postponed would foster delay and procedural redundancy (in keeping with the legislative intent behind the passage of section 1105a). This Court first recognized an exception to section 1105a allowing district court review in *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968). In *Cheng Fan Kwork*, the Court held that while exclusive review of "final orders of deportation" is in the court of appeals, in situations relating to review of collateral matters, an "alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court." *Id.* at 210. Numerous courts have followed the instructions and logic

⁵ Section 306 of IIRIRA restructured judicial review of deportation orders (renamed "orders of removal"), and repealed section 106 of the INA, 8 U.S.C. section 1105a, in its entirety.

of *Cheng Fan Kwok*, holding that matters collateral to a final order of deportation are properly raised and reviewed under section 1105a in federal district court.⁶ See, e.g., *Baria v. Reno*, 94 F.3d 1335 (9th Cir. 1996) (district court has jurisdiction to hear challenge to rescission order); *Gottesman v. INS*, 33 F.3d 383 (4th Cir. 1994) (decision by district director rescinding LPR status not part of final order under *Chadha*); *Olaniyan v. District Director, INS*, 796 F.2d 373, 376-77 (10th Cir. 1986) ("If the issues do not meet the jurisdictional tests of

⁶ The Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), although cited by Petitioners, did not alter the status of the traditional exceptions under section 1105a that permit district court review. *Chadha* involved an alien who had his suspension of deportation vetoed by the House of Representatives. This Court held that the court of appeals, pursuant to section 1105a, had jurisdiction to consider *Chadha*'s constitutional challenge to the immigration statute, which allowed either house of Congress to veto the Attorney General's suspension of deportation. As the Court reasoned, *Chadha* "directly attack[ed] the deportation order itself, and the relief he [sought]—cancellation of deportation—[was] plainly inconsistent with the deportation order." *Id.* at 939. *Chadha* thus attacked an order that was *already final*, making review in the court of appeals proper. Significantly, *Chadha*'s challenge was to the constitutional validity of the statute, and did not require, as in this case, the development of a factual record for meaningful review.

Additionally, it was necessary for *Chadha* to complete his deportation proceedings *before* he could challenge the House veto, as the veto could not, by its very nature, occur until the end of the proceedings. As such, *Chadha* simply could not have attacked the constitutionality of the statute (or the deportation order) until after the House had vetoed his suspension. Respondents, on the other hand, make constitutional claims that are ripe for review prior to the entry of any final order. Nothing would be gained in this case by further deportation proceedings and administrative appeals, except the very delay and procedural redundancy section 1105a was enacted to eliminate. Unlike *Chadha*, Respondents challenge a decision by the government to selectively target them for deportation, a decision that is clearly distinct from, and preliminary to, a final order of deportation. As such, section 1105a would not permit the court of appeals to review Respondents' constitutional claims; in such instances, jurisdiction for initial review is with the district court.

[section 1105a], we have no authority to review them under the auspices of that section, and exclusive jurisdiction for initial review lies in the district court"); *Jaa v. INS*, 779 F.2d 569, 571 (9th Cir. 1986) (district court has jurisdiction to review determinations "ancillary to an application for permanent residency"); *Young v. United States Dep't of Justice, INS*, 759 F.2d 450, 457 (5th Cir. 1985) (BIA refusals to open bond determinations are not reviewable under section 1105a); *Ghaelian v. INS*, 717 F.2d 950, 952 (6th Cir. 1983) (section 1105 does not grant jurisdiction to review constitutionality of INS regulations that are not central to the deportation decision); *Toole v. INS*, 722 F.2d 1434, 1437 (9th Cir. 1983) (court of appeals lacked jurisdiction to review district director's decision denying an extension of stay, because the decision was not a final order of deportation); *Mohammadi-Motlagh v. INS*, 727 F.2d 1450, 1452 (9th Cir. 1984) (explaining that "*Chadha* . . . does not signify that the Court has retreated from the narrow construction of section 1105a(a) adopted in *Cheng Fan Kwok v. INS*."). See also, *Akrap v. INS*, 966 F.2d 267, 270 (7th Cir. 1992) (denial of stay by BIA not reviewable in the circuit court); *Vlassis v. INS*, 963 F.2d 547 (2nd Cir. 1992) (same); *Reynolds v. INS*, 846 F.2d 1288 (11th Cir. 1988) (same); *Reid v. INS*, 766 F.2d 113 (3d Cir. 1985); *Abedi-Tajrishi v. INS*, 752 F.2d 441 (9th Cir. 1985); *Gando-Coello v. INS*, 857 F.2d 25, 26 (1988); *Butros v. INS*, 804 F. Supp. 1336, 1339 (D. Ore. 1991); *Ali v. INS*, 661 F. Supp. 1234 (D. Mass. 1986) (district court review proper where complaint challenging INS' procedures for handling marriage petitions raises matters collateral to deportation order). This traditional rule of reason, allowing district court review of claims preliminary to, or not a part of, final orders of deportation should not be abandoned now, as it promotes the judicial efficiency which section 1105a sought to provide. Initial district court review obviates the holding of needless administrative hearings and appeals while constitutional or statutory claims lie in abeyance, instead providing review

of possibly dispositive issues prior to the filing of a final order of deportation.

3. The soundness of initial district court review is best illustrated by class action challenges to deportation proceedings that contain allegations of constitutional and statutory violations. In *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), this Court held that appellate review of individual cases would mean that "meaningful judicial review of [the] statutory and constitutional claims would be foreclosed." *Id.* at 484. Recognizing that an appellate court lacks the fact finding and record-developing capabilities of a federal district court, the Court stated that "[i]t therefore seems plain to us . . . that restricting judicial review to the courts of appeals as a component of the review of an individual deportation order is the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims." *Id.* at 497-98. Yet, this is precisely what Petitioners propose: a foreclosure of district court review, with appellate review of individual cases following individual administrative proceedings and administrative appeals. In cases alleging class-wide violations, such a procedure would merely result in needless administrative hearings and appeals (where potentially dispositive claims would go unheard) on a case-by-case basis, followed by appellate review of individual final orders of deportation (which would be devoid of any factual record as to the constitutional or statutory claims), followed by, presumably, a case-by-case remand to the district court for additional fact finding. Such a disruptive procedure would surely frustrate the expressed legislative intent behind the enactment of section 1105a, as it would do nothing more than fill the courts of appeal with thousands of claims that could have been promptly resolved in a single, unified district court action.

This is not merely a hypothetical, doomsday scenario: *Tefel v. Reno*, 972 F.Supp. 623 (S.D.Fla. 1997), which is currently pending before the Eleventh Circuit, involves

a class action challenge to a governmental policy that plaintiffs contend unconstitutionally deprives class members, estimated to be in excess of 40,000 individuals, of their right to seek suspension of deportation in the United States. *Id.* at 626 n.4. As *Tefel* makes clear, if section 1105a no longer permits district court review of class actions, as Petitioners argue, then the result for *Tefel* (and cases like it) would be 40,000 separate, individual appeals brought in the courts of appeal, with the possibility, under Petitioners' rubric, of 40,000 remands to the district court for additional fact finding. And this would be *after* the 40,000 individuals had finished with their administrative hearings and appeals. Obviously, such a result does not eliminate delay and procedural redundancy, but instead actually creates it. With constitutional class-action challenges such as *Tefel* in the pipeline, the most judicious ruling in this case would be to retain the reasonable and traditional exceptions to section 1105a intact.

As the Eleventh Circuit recognized in *Jean v. Nelson*, "postponing conclusive judicial resolution of a disputed issue that affects an entire class of aliens until an individual petitioner has the opportunity to litigate it on habeas corpus would foster the delay and procedural redundancy that Congress sought to eliminate in passing section 1105a." Allegations that immigration officials engaged in practices that violate the constitutional rights of a class of aliens "constitute wrongs which are independently cognizable in the district court under its federal question jurisdiction."⁷ *Haitian Refugee Center*. In hold-

⁷ The court in *Haitian Refugee Center* candidly acknowledged the "surface appeal" of the government's argument, which is the same as Petitioners' here, that *Foti v. INS*, 375 U.S. 217 (1978) and the legislative history of section 1105a barred district court review (and thus would require each class member to raise statutory or constitutional claims individually in the court of appeals). The court, however, persuasively rejected the government's claim, instead recognizing both the benefit to conclusive district court resolu-

ing that the district court had jurisdiction pursuant to an exception to section 1105a, the court drew a distinction between "the authority of a court of appeals to pass upon the merits of an individual deportation order and any action in the deportation proceeding to the extent it may affect the merits determination, on the one hand, and, on the other, the authority of a district court to wield its equitable powers when a wholesale, carefully orchestrated, program of constitutional violations is alleged." *Id.*

McNary, Jean, and Haitian Refugee Center illustrate the sound logic of permitting district court review under section 1105a of constitutional and statutory claims that are not part of a final order of deportation (and that could not be reviewed administratively), and that also require the development of a factual record.⁸ Petitioners, on the other hand, cite only *Massieu v. Reno*, 91 F.3d 416 (3d Cir. 1996), a case in which the Third Circuit held that since *Massieu's* challenge was neither procedural nor collateral, review was proper in the court of appeals. *Massieu* is not helpful to Petitioners, however, because

tion of class-wide statutory and constitutional issues before the entry of a final order, and the senselessness of sending potentially thousands of individual class members to the court of appeals.

⁸ The rationale behind these holdings has been adopted by many courts. See, e.g., *El Rescate Legal Serv. v. Executive Office for Immigration Review*, 959 F.2d 742, 746-47 (9th Cir. 1991) (district court had jurisdiction to review class action alleging pattern and practice of constitutional and statutory violations); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1503, *aff'd sub nom.*, *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990) (to require plaintiffs to raise constitutional pattern and practice claims in deportation proceedings "would effectively ensure that some class members would never be able to raise the claims or secure redress"); *Campos v. Nail*, 940 F.2d 495, 497 (9th Cir. 1991) (district court has jurisdiction to review class-action challenge to unconstitutional practices and procedures by immigration judge); *Ali v. INS*, *supra* (district court has jurisdiction to hear constitutional challenge to INS' marriage petition process).

it did not reject the proposition that district courts have jurisdiction under section 1331 to review challenged administrative practices, policies, and procedures when meaningful review in the courts of appeals is precluded for want of a factual record.⁹ *Id.* at 243. As the district court in *Massieu* noted, this was not a case that needed a factual record because the "claims presented 'pure questions of law' for which no agency fact-finding would be required or even marginally illuminating." *Massieu v. Reno*, 915 F. Supp. 681, 694 (D.N.J. 1996), *rev'd on other grounds*, 91 F.3d 416 (3d Cir. 1996). Respondents, on the other hand, present fact-based constitutional claims which require a factual record that can only be developed at the district court.

Further, since Respondents' claims are entirely collateral to the determination of whether they are deportable on the basis of the substantive charges against them, requiring that they first proceed through lengthy deportation hearings and administrative appeals before reaching their constitutional claims would add a meaningless extra layer of review, thereby causing procedural redundancy. If, however, initial district court review is available, and Respondents prevail, unnecessary administrative proceedings and court of appeals review would be avoided.

In short, the traditional exceptions to section 1105a allowing district court review of constitutional and statutory claims, and class actions, which have been guided by rea-

⁹ The court in *Massieu* cited with approval *Yi v. Maugens*, 24 F.3d 500, 506 (3d Cir. 1994), which held that district courts retain their federal question jurisdiction "when the challenged administrative practice, policy or procedure precluded adequate development of the administrative record and consequently meaningful review under the procedures set forth in § 1105 and/or when the challenged practice was collateral and divorced from the substantive aspects underlying the alien's claim." Petitioners' reliance on *Massieu* is therefore misplaced, as the Third Circuit also recognizes an exception to section 1105 that permits district court review of procedural and collateral challenges that require the development of a factual record.

son and the legislative intent behind section 1105a, should be retained.

III. BY ITS VERY TERMS, SECTION 2347(b) APPLIES ONLY WHERE NO AGENCY HEARING HAS BEEN HELD

1. The government asserts that the rarely-used transfer provision of the Hobbs Act, 28 U.S.C. section 2347(b)(3), is available to Respondents for post-final order transfer of their selective enforcement claims to the district court. In doing so, the government distorts the text of section 2347(b) and ignores procedural and contextual obstacles to such an alternative.

First, only a creative reading of section 2347(b)(3) would support the government's contention. On its face, section 2347(b) applies only when the agency has not held a hearing before taking the action of which the petitioner seeks review. The government failed to mention this threshold point in its certiorari petition or in its brief.

By its terms, section 2347(b)(3) does not apply in the context in which the government seeks to use it in this case. That is, the government says that after a final order of deportation, the court of appeals may invoke section 2347(b)(3) to transfer the case to the district court for fact-finding. To state the obvious, if there is a final order of deportation, the INS has held a hearing, and section 2347(b) does not apply. The government concedes that section 2347(b) applies only to issues not required to be resolved by the agency, but does not acknowledge that section 2347(b) applies only if no hearing was held and if the agency is not required to hold a hearing. Pet. Br. at 19.

The government further contends that nothing in the text of the Hobbs Act or the INA renders the transfer mechanism inapplicable to judicial review of final orders of deportation. *Id.* This statement is simplistic and misleading. There is a final deportation order to review only

if there has been a deportation hearing. If there is a final order, by its terms, section 2347(b) does not apply because a hearing has been held.

2. Further, the government says that a "reviewing court may transfer a case to the district court for resolution of *ancillary* factual issue." Pet. Br. at 9 (emphasis added). This is not what section 2347(b) says, however. The statute does not say anything about "ancillary issues"; it does not distinguish between "ancillary" and "main" issues and does not distinguish between hearings in which all issues were resolved and hearings in which "ancillary" issues were not resolved. There is, of course, no definition of "ancillary" in section 2347(b), nor does the government offer any definition or interpretive authority. In short, to adopt the government's suggestion that section 2347(b)(3) is the proper and necessary path for Respondents, the Court must read into the statute words and concepts that are not there. *Demarest v. Manspeaker, supra.*

3. Not surprisingly, no court has ever accepted such an interpretation of section 2347(b)(3), as far as *amici* are aware. The few reported decisions pertaining to or mentioning section 2347(b) in the non-immigration context illustrate that it is to be invoked when the agency has not conducted a hearing. For example, in *Florida Power and Light Co.*, the Court said: "The Hobbs Act specifically contemplated initial court of appeals review of agency orders resulting from proceedings in which no hearing took place." Further:

Given the choice of the Hobbs Act as the primary method of review of licensing orders, we have no reason to think Congress in the Atomic Energy Act would have intended to preclude initial court of appeals review of licensing proceedings in which a Commission hearing did not occur when the Hobbs Act specifically provides for such review and the

consequences of precluding it would be unnecessary duplication of effort.

Id. at 740-41.

In *Exportal Ltda v. U.S.A.*, 902 F.2d 45, 48, n.3 (D.C. Cir. 1990), the court said that the absence of a hearing is not an impediment to review under the Administrative Orders Review Act "when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented. 28 U.S.C. section 2347(b)(2) (1982)."

In *Lake Carriers' Ass'n v. U.S.A. (FCC)*, 414 F.2d 567-68 (6th Cir. 1969), the Federal Communications Commission had not conducted an evidentiary hearing on Lakes Carriers' request for a waiver. The Court of Appeals transferred the proceedings to the district court pursuant to section 2347(b)(3) "for the purpose of hearing evidence and making findings of fact as to the averments of the petition [for review]." After the district court conducted a "thorough evidentiary hearing" and filed comprehensive findings of fact and conclusions, the petitioners stipulated that the district court hearing constituted a hearing on the merits, as they had sought, and moved to dismiss their petition to review the FCC's decision.

Similarly, in *Radio Relay Corp. v. FCC*, 409 F.2d 322, 329-331 (2d Cir. 1969), Radio Relay requested the court transfer the matter to the district court for a hearing. Radio Relay conceded "that the Commission was not required to hold a hearing in this rule-making proceeding" but argued that the Commission should have conducted an evidentiary hearing in its discretion. *Id.* at 229-330. The Second Circuit avoided deciding whether Radio Relay was "entitled" to a hearing by holding that it had failed to present a "genuine issue of material fact, as section 2347(b)(3) requires." *Id.*

4. In the immigration context, the two courts of appeals to consider section 2347(b)(3) both have held that

it was precluded by former INA section 1105a(a)(4), requiring the court's determination to be solely on the administrative record. *Ghorbani v. INS*, 686 F.2d 784, 787, n.4 (9th Cir. 1982) (observing, however, that if section 2347(b) were available, its application would be appropriate in that case); *Coriolan v. INS*, 559 F.2d 993, 1003 (5th Cir. 1997) (transfer to the district court is available only where there is a question of nationality; section 1105(a)(5)(B) is specific, thus it overcomes section 1105a(a)(4)).

In its 1995 decision in this case, the Ninth Circuit rejected the government's assertion that section 2347(b) provided a mechanism for developing a factual record in this case. *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 145, 1056-57 (9th Cir. 1995). Subsequently, post-IIRIRA, in its order dated February 5, 1997, the District Court rejected the INS' suggestion that a remand to district court under section 2347(b) might be appropriate. On appeal, the Ninth Circuit remained unpersuaded by the government's arguments. *American-Arab Anti-Discrimination Committee v. Reno*, 119 F.3d 1367, 1373 (9th Cir. 1997).

With remarkable understatement, the government conceded that how section 2347(b)(3) would work in practice is "ambiguous." Pet. Br. at 48. There is neither a statute nor regulation nor case law to guide a court of appeals in the mechanics of a section 2347(b)(3) transfer to the district court after a final deportation order. The government argues that this procedure would apply in "exceptional" cases, but it is possible that every petitioner might argue that his or her case was appropriate for transfer on some newly discovered facts or on an issue not presented to the BIA. This is to say nothing of the thousands of people, such as those in *McNary*, *Jean v. Nelson*, and *Haitian Refugee Centers*, *supra*, who otherwise would bring their claims in a district court action.

IV. ALTHOUGH RESPONDENTS COULD NOT CHALLENGE THIS SELECTIVE ENFORCEMENT OF DEPORTATION PROCEEDINGS, MANY CONSTITUTIONAL CLAIMS MAY BE PRESENTED TO THE IMMIGRATION JUDGE AND THE BOARD OF IMMIGRATION APPEALS

1. Permitting Respondents to pursue their claim in the district court in the first instance will not open the floodgates to thousands of other non-citizens seeking to avoid deportation through preemptive district court actions. Unlike this case, where plaintiffs sought to prevent selective enforcement of the law, many allegations of the constitutional violations can be adjudicated by immigration judges and the BIA.

Courts sometimes have broadly said that the BIA lacks jurisdiction to adjudicate constitutional questions. *Gonzalez-Julio v. INS*, 34 F.3d 820, 822 (1994). "A narrower and more accurate statement would be that the BIA lacks jurisdiction to decide questions of the constitutionality of governing statutes or regulations." *Zhen Tau Liu v. Waters*, 55 F.3d 421, 425 (9th Cir. 1995). The BIA does have authority to "fix administratively correctable procedural errors, even when these errors are failures to follow due process." *Id.* at 426; *Alleyne v. INS*, 879 F.2d 1177, 1186, n.11 (3d Cir. 1989) (same); *Orhorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994) (BIA erred in reversing the immigration judge's decision to suppress documents seized in an "egregious" violation of constitutional rights); *Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994) (BIA erred in reversing immigration judge's decision to grant motion to suppress; stop resulted solely from Gonzalez's Hispanic appearance and constituted a bad faith and egregious violation of the Fourth Amendment); *Cf. INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

That some constitutional violations may be considered by immigration judges and the BIA does not mean that

all cases involving constitutional rights must be heard first or exclusively in deportation proceedings. Broad-based challenges to INS patterns and practices are properly brought in the district court. See discussion regarding *McNary, Jean v. Nelson*, and *Haitian Refugee Center*, *supra*. Further, facial constitutional challenges not requiring factual development can be decided initially in the courts of appeals. *Zhen Tau Liu v. Waters*, *supra*.

Respondents' claims also were properly brought in the district court. Respondents challenged the discretionary decision of the INS district director to commence deportation proceedings against them. The immigration judges and BIA have no authority to review the discretionary decision of the district director, nor to hold that such a decision violated Respondents' right to be free from selective enforcement. *Cheng Fan Kwok*, *supra*; *Ghorbani v. INS*, *supra*.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Court of Appeals and reserve traditional district court review of Respondents' statutory and constitutional claims under 8 U.S.C. section 1105a.

Respectfully submitted,

NADINE K. WETTSTEIN
AMERICAN IMMIGRATION LAW
FOUNDATION
1400 Eye Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 216-2400

IRA J. KURZBAN
Counsel of Record
PETER HOFER
KURZBAN, KURZBAN,
WEINGER & TETZELI
2650 SW 27th Avenue
Miami, FL 33133
(305) 444-0060

Attorneys for Amici Curiae

September, 1998